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Letter Ruling 11-4: Massachusetts Sales/Use Tax: Online Services for Prospective Employees

April 12, 2011

On behalf of your client, *****("Taxpayer"), you have requested a letter ruling with respect to the Massachusetts sales and use tax as it applies to the Taxpayer's online services. Specifically, you request a ruling on whether such services are subject to the sales tax imposed under G.L. c. 64H, § 2 when sold to Massachusetts customers. The following is your representation of the facts upon which we base this ruling.

I. FACTS

Taxpayer is an ***** corporation that helps organizations to manage their workforce. One of the products sold by the Taxpayer is the ***** ("Product") which aids in the employee application gathering and selection process. The Product uses software that was developed by the Taxpayer and remains on the Taxpayer's server. Customers access the Product remotely via the Internet. No portion of the Taxpayer's software is delivered to its customers on a tangible medium, nor is any portion electronically downloaded to its customers' equipment. In addition, the Taxpayer's customer contracts do not provide a license of software or confer any rights to use the software to its customers.

The Product is based on the hiring needs of the Taxpayer's customers. To set up the Product, customers provide the Taxpayer with a listing of their current employment opportunities and related job descriptions via e-mail. The Taxpayer develops a customized Internet web portal for each of its customers, which displays the employment opportunities for prospective employees. A link to the web portal that contains the job postings is placed on the websites of the Taxpayer's customers. Prospective employees use the link on the customer's web site to view the Taxpayer's internet web portal where they can search the job postings and complete and submit electronic applications.

The Product includes a behavioral assessment, which is a series of questions developed by the Taxpayer that measure critical aspects of an applicant's individual characteristics that can influence whether the person is likely to succeed or fail at a particular job. The assessments are grounded on the principles of selection science and industrial psychology and are the result of large-scale research studies conducted by the Taxpayer. The Taxpayer consults with each customer to create customized assessments based on critical behaviors needed to succeed at the customer's jobs. Through the Internet portal, customers can select which behavioral assessment questions they would

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like posed to applicants. In addition, customers have a limited ability to add, delete and modify job postings.

The Product automatically analyzes data submitted by applicants and determines which applicants meet the minimum qualifications and fit the job descriptions. Customers do not generate reports by using the Product. Rather, the results of the analysis are automatically furnished to the Taxpayer's customers in the form of online reports once the analysis of the applicants has been completed. Customers access the reports via the Internet and have the ability to search and sort information in the reports. The reports are specific to each customer and the information contained in the reports is not provided to other customers. Customers are charged for the Product based on the number of employees that have access to the Product or the number of employment locations.

II. ISSUE

Whether sales to Massachusetts customers of the Taxpayer's Product, which provides employment application collection and selection services through proprietary software, are subject to the Massachusetts sales and use tax.

III. RULING

Sales of the Taxpayer's Product to Massachusetts customers are not subject to the Massachusetts sales and use tax.

IV. LAW AND ANALYSIS

Massachusetts imposes a 6.25% sales tax on sales of tangible personal property and telecommunication services within the Commonwealth including sales of prewritten (also called "canned" or "standardized") software regardless of the method of delivery. Charges for prewritten software, whether it is electronically downloaded to the customer or accessed by the customer on the seller's server (including the Software as a Service business model) are generally taxable. The rules relating to tax on computer hardware and software are contained in the Computer Industry Services and Products Regulation, 830 CMR 64H.1.3. Section (3) provides the following:

(3) General Rules.

(a) Sales Tax. Sales in Massachusetts of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form are generally subject to the Massachusetts sales tax. Taxable transfers of prewritten software include sales affected in any of the following ways regardless of the method of delivery, including electronic delivery or load and leave: licenses and leases, transfers of rights to use software installed on a remote server, upgrades, and license upgrades. The vendor collects sales tax from the purchaser and pays the sales tax to the Commissioner.

The sale of a license or right to use software on a server hosted by the taxpayer or a third party, as described in 830 CMR 64H.1.3(3)(a), are taxable under Massachusetts sales and use tax laws. However, where there is no charge for the use of the software and the object of the transaction is acquiring a good or service other than the use of the software, sales or use tax on software does not apply. See 830 CMR 64H.1.3(14)(a); LR 10-1.

In the present case, the Taxpayer provides information services to its customers based on data it gathers from prospective employees and then provides this information to its customers in a report. Under these facts, the object of the customers' purchase of the Product is to obtain database access including reports prepared by the Taxpayer, rather than the use of the software itself. Thus, the sale of the Taxpayer's Product constitutes nontaxable services that allow customers to access information regarding prospective employee applications that the Taxpayer has gathered and screened for the customer. The Taxpayer's customers do not have the ability to operate, direct, or control the software. Rather, the Product automatically collects and screens applications and prepares reports for its customers. Although the customers have the limited ability to edit job descriptions, modify application questions, and view reports on-line, this limited functionality is not sufficient to render the transaction a sale of software.

V. CONCLUSION

Based on the facts provided and the reasoning above, a customer's purchase of the Product allows that customer to obtain information in the Taxpayer's database, including reports prepared by the Taxpayer. The services provided by the Taxpayer do not involve transfers of prewritten software, either in tangible or electronic form, or a license to use software on a server hosted by Taxpayer or a third party, as described in 830 CMR 64H.1.3(3)(a). The sale of the Taxpayer's Product is not subject to the Massachusetts sales and use tax.

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:wm

LR 11-4